IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF FOR SEARS, ROEBUCK AND CO.

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I. INTRODUCTORY STATEMENT

In its principal brief ("Pet. Br."), Sears argued that state courts are not preempted by the National Labor Relations Act ("NLRA" or "the Act") from framing and enforcing an injunction aimed narrowly at trespassory union activity on private property. Regulation of such conduct, it was submitted, touches interests that are "deeply rooted in local feeling and responsibility." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244 (1959). Absent such regulation there would be a legal vacuum and the risk of undesirable physical confrontations.

Respondent Union and *amicus curiae*, the National Labor Relations Board, have now responded with several arguments,

many merging the jurisdictional issue before this Court with the underlying merits of the case. The Union asserts that because its activity in this case was "arguably" protected by the Act, the courts below were thereby automatically preempted from asserting jurisdiction. The Board urges a similar result alleging that, as the Union's conduct was "arguably" prohibited by the Act, there was an alternative forum in which to litigate the legality of such conduct. Both the Union and the Board also contend that while admittedly "there is a substantial state interest in prohibiting [the Union's] picketing because it occurred on private property, the potential for interference with the federal regulatory scheme is too great to warrant an exception to *Garmon* permitting such regulation. . . ." Bd. Br., p. 7; Union Br., pp. 6-7. Finally, the Union now contends, for the first time, that resolution of the preemption issue "in the present context would be premature" since it is not clear whether, "if the California courts had asserted jurisdiction, an injunction would have issued." Union Br., p. 5.

In reply, Sears will demonstrate four basic points:

1. Notwithstanding whether the Union's conduct was either "arguably" protected or "arguably" prohibited, the risk of conflict between state and federal regulation in trespass cases is minimal in view of the adequate safeguards that presently exist. Accordingly, the risk of any conflict is outweighed by the deeply-rooted state interest in protecting private property and preventing violence and disregard for the law.

2. Wholly apart from these historic factors, which have provided the predicate for state court jurisdiction in the past, the appropriate test in the circumstances of the instant case, *i.e.*, cases involving the application of state trespass statutes to union activity, is whether the conduct is "actually" protected. *International Longshoremen's Association* v. *Adriadne Shipping Co.*, 397 U. S. 195, 202 (1970) (White, J., concurring). That test has not been met in this case.

3. Similarly, the "arguably" prohibited test is inapplicable to disputes involving, as here, the lawfulness of the location of union activity on private property rather than its purpose—the *location* of union activity will never give rise to a violation of Section 8(b) of the Act.

4. The Union's assertion that a determination as to the propriety of an injunction under California state law should be a prerequisite to this action is without merit for three independent reasons: (i) the merits of the issue cannot be addressed until the instant jurisdictional issue is resolved; (ii) the state law argument has not been raised in timely fashion; and (iii) in any event, the Union's construction of state law is incorrect.

II. ARGUMENT

1. As discussed at length in Pet. Br., pp. 7-14, and now conceded by the Board, "there is a substantial state interest in prohibiting [union] picketing because it occurred on private property[.]" Br. Br., p. 7.[1] See *Taggart* v. *Weinacker's*, 397 U. S. 223, 227-229 (1970) (Burger, C.J., concurring). It is immaterial, therefore, as to whether the conduct here at issue is either "arguably" protected or prohibited by the Act; it may nevertheless be regulated by the states as an exception in the *Garmon* doctrine unless other countervailing factors are present. The Union and the Board attempt to establish such countervailing interests in this case by conjuring up the specter of a potential conflict between state and federal regulation of the conduct here at issue. There is no merit to this contention.

First, as demonstrated at Pet. Br., pp. 12-18, there is no reason "to assume . . . that a state will so construe its [trespass] law . . ." as to conflict with a union's rights under the NLRA. *Allen-Bradley Co.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 746 (1941). The Board even has recourse under *N. L. R. B.* v. *Nash-Finch*, 404 U. S. 138 (1971), to a federal district court injunction against both an employer and the state court in the "rare cases" (Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassing Union Activity*, 83 Harv. L. Rev. 552, 553 (1970)) where its views conflict with those of the state court, and the state court "refuse[s] to vacate the injunction

1. The Union's contention that California does not possess a "deeply rooted" interest in regulating union picketing or private property because California law does not prohibit such conduct is refuted by the contrary findings of the California Court of Appeal in its two decisions in this case. See Pet. App., pp. A13, A30. The California Supreme Court did not question this aspect of the lower court's holding, although it was free to do so. Indeed, if the California Supreme Court had disagreed with the lower court on this point, presumably it would have so stated since it could thereby have avoided the preemption question, as now urged by the Union. See Union Br., pp. 8-9.

in these circumstances[.]" *May Department Store Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 164, 355 N. E. 2d 7, 12 (1976). The Board may also immediately seek injunctive relief, upon the filing of an unfair labor practice charge, under Section 10(j) of the Act, 29 U. S. C. § 160(j). Pet. Br., pp. 16-17; NLRB's General Counsel's Report on Case Handling Developments at NLRB, 96 Labor Relations Reporter 171, 175 (Bureau of National Affairs, October 31, 1977).

Second, the Board and the Union apparently believe that *Farmer* v. *United Brotherhood of Carpenters, and Joiners of America, Local 25*, ... U. S. ....., 97 S. Ct. 1056 (1977), requires a finding of preemption whenever a substantial risk of conflict between state and federal regulation exists, even where the state's interest in regulating the conduct in question is, in fact, "deeply rooted". *Farmer* does not, however, require such a result; it calls instead for a *"balanced inquiry* into [these] factors. . . ." 97 S. Ct. at 1064 (emphasis added). The balance in trespass cases tips in favor of concurrent jurisdiction. Initially, the "deeply rooted" state interest involves more than the preservation of property rights; the desire to prevent physical confrontation and violence is also at the crux of the state interest. See Pet. Br., pp. 8-14.[2] On the other hand, the risk of inconsistent judgments is neither great nor frequent in trespass cases, and when it occurs, as already noted, it is correctible. Moreover, if a state court's view as to the legality of the location of the union's trespass did conflict with that of the Board, the state injunction "merely ha[s] the effect of maintaining the

2. The preservation of property rights is not solely a state interest; it is also an important federal policy. *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Scott Hudgens* v. *N. L. R. B.*, 424 U. S. 507 (1976). See also *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972). By the same token the prevention of violence has provided a basis for allowing concurrent jurisdiction in a libel context. *Linn* v. *Plant Guards, Local 114*, 383 U. S. 53, 64 n. 6 (1966). Trespass situations present an even more severe threat of physical confrontation, as well as the federal and state interest in preserving property rights.

status quo during the pendency of the NLRB proceedings." *May Department Stores*, 64 Ill. 2d at 164; 355 N. E. 2d at 12. A finding of preemption, however, would cause the employer to "suffer serious harm" to its property rights "while the NLRB was considering whether an unfair labor practice should issue." *Ibid.* The threat of a state court proceeding would even accelerate the Board's processes by motivating a union to file an unfair labor practice charge when asked to remove its activity to a public situs. Absent a threat of a state court action, a union engaged in only "arguably" lawful, and hence possibly unlawful conduct, will not file a charge, as occurred in the instant case. A simple request to leave private property would not motivate a union to risk an adverse Board decision with regard to such "arguable" conduct. Accordingly, an employer, in the absence of state court jurisdiction, would have to resort to physical self-help to obtain a hearing, and risk the physical confrontations that ordinary recourse to the courts could obviate.[3]

Third, the Union seeks to avoid the basic jurisdictional question, whether state courts can ever act in alleged trespass situations, by focusing instead on the merits of this case. For example, its assertion that conflict is likely in trespass situations is based almost entirely upon a comparison between the narrow factual

3. Such circumstances, by which an employer must commit an unfair labor practice in order to obtain a forum for a civil wrong, constitutes the "absence of a *meaningful opportunity* for hearing [and] violates the most fundamental requirements of the Due Process Clause." *Watson* v. *Branch County Bank*, 380 F. Supp. 945, 972 (W. D. Mich. 1974) (citation omitted, emphasis added). See Pet. Br., pp. 16-18 and nn. 9 and 10; and *Motorcoach Employees* v. *Lockridge*, 403 U. S. 274, 326 (1971) (White, J., dissenting). Indeed, as even the Board has admitted, it is a "right of all persons to resort to the civil courts to obtain an adjudication of the claims". *Clyde Taylor Co.*, 127 NLRB 103, 108 (1960); and see also the NLRB General Counsel's Report on Case Handling Developments at NLRB, reprinted in 96 Labor Relations Reporter 141 (Bureau of National Affairs, October 24, 1977), noting that a Board Administrative Law Judge sustained an employer's right to resort to the state courts in response to trespassory conduct by union pickets.

issue of the instant controversy, *i.e.*, non-employee picketing on private property containing a single retail business establishment, and the facts of *Scott Hudgens*, 230 NLRB No. 73. These situations, however, are not typical. As this Court recognized in *Hudgens* (424 U. S. at 521), there is a wide spectrum of factors involved and, in most instances, there will ordinarily be alternative means of communication available to a union which will eliminate the risk of conflict. See Pet. Br., pp. 12-13. In these instances, the union would have no right to compel a "yielding" of employer property rights and the assertion of state jurisdiction would raise no conflict.

2. State courts should not be preempted from regulating trespassory union picketing which is, as here, "arguably" protected by the NLRA, unless it is first determined by the state court to be "actually" protected. See *Adriadne*, 397 U. S. at 202 (1970) (White, J., concurring); *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 325-327 (1971) (White, J., and Burger, C. J., dissenting). Every instance of a union trespass on private property, regardless of its form or object, is "arguably" protected by Section 7 of the NLRA. Nevertheless, as both the Union and Board concede, there are "clear" cases in which the state courts are entitled to concurrently regulate such conduct. See Union Br., pp. 29-31, n. 14; Bd. Br., p. 15, n. 9. *Ab initio*, however, even in these "clear" instances, the state courts must determine whether "actual", rather than "arguable", violence has occurred. They must decide whether, in

4. For example, it is acknowledged that a sit-in at a plant is not protected by the Act and is subject to state regulation. *N. L. R. B.* v. *Fansteel Metallurgical Co.*, 306 U. S. 240 (1939); Union Br., pp. 29-31, n. 14. Similar conduct, however, in slightly different circumstances, may be protected. See, e.g., *United Merchant's Mfg., Inc.* v. *N. L. R. B.*, 554 F. 2d 1275 (4th Cir. 1977) (affirming a Board order in which, *inter alia*, a 25 minute work stoppage, in plant, was held to be protected activity). It is likewise not uncommon for the Board and the courts of appeals to disagree as to the protected status of certain conduct. See, e.g., *Associated Grocers of New England, Inc.* v. *N. L. R. B.*, ... F. 2d ...., 96 LRRM 2630 (1st Cir. September 16, 1977) (rejecting a Board rule that a strikers' threat unaccompanied by an overt physical threat is protected activity).

fact, there has been impermissable conduct "within the store" or other unprotected trespasses. Of course, the determination as to whether the requisite misconduct occurred may be complex and difficult.[4] The state courts must, nevertheless, make such a decision and, notwithstanding that such conduct may ultimately be deemed activity that falls within the ambit of Section 7 of the Act, initially review such activities in order to decide whether state jurisdiction should be invoked and, if so, the scope and nature of a restraining order. Contrary to the Union's position (Union Br., p. 6), therefore, this Court has repeatedly recognized exceptions to *Garmon* where the activity involved is "arguably" subject to the protection of the Act. It is only where the activity is actually protected that *Garmon* has interposed an insurmountable barrier to state court action.

In the present case, although the Union's picketing is "arguably" protected by the Act under the Board's *Hudgens* rule (see Union Br., pp. 24-27; Bd. Br., pp. 10-12), the conduct may also not be protected by the Act and subject to state regulation.[5] To repeat, however, this issue does not essentially differ from other choices already confronting state courts—whether,

5. This determination will, of course, depend on whether *Hudgens* correctly established "the locus of . . . the accommodation", and, if so, whether such a "generic situation" can be equated to that involved in the instant case. *Hudgens* v. *N. L. R. B.*, 424 U. S. at 521-3. *Hudgens*, as the Union observes (Br., p. 26), has not been subject to appellate court review, and is also sharply at odds, in many respects, with prior Board and court decisions. See, e.g., *S. E. Nichols of Ohio*, 200 NLRB 1130 (1972); *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539 (1972).

There are also acknowledged differences between *Hudgens* and the instant case. See Union Br., p. 27. *Hudgens* involved a shopping center, the instant case does not (cf. *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539); the desired location of the picketing in *Hudgens* was inside the center which was not the case here; and in this case the Union had another, effective alternative location at which to picket. Pet. Br., p. 13, n. 8. Furthermore, the Board's reliance in *Hudgens* on the fact that the center is "open to the public" echoes the constitutional standards of *Amalgamated Food Emps., et al.* v. *Logan Valley Plaza, et al.*, 391 U. S. 308 (1968), rejected by this Court in its *Hudgens* decision.

for instance, mass picketing sufficiently obstructs traffic so as to be subject to state regulation under *Allen-Bradley*. See also Pet. Br., pp. 11-12. The instant case, as a result, does not present a situation which is either novel or uncommon. This Court has consistently recognized, in effect, that, even though conduct is "arguably" protected, it may nevertheless not be preempted absent a determination that it is actually protected.

3. The Board also contends (Bd. Br., pp. 7-9) that the Union's conduct in this case is "arguably" prohibited, as well as "arguably" protected, by the Act, a contention not presented by the Union. The Union's picketing in this case, the Board submits, is "arguably" prohibited by both Section 8(b)(7)(C) (prohibiting picketing with a recognitional objective beyond 30 days without filing a petition for election with the Board) and Section 8(b)(4)(D) (prohibiting picketing that has as an object to force reassignment of work) of the Act. The Board overlooks, however, the critical distinction between the location and the purpose or objective of picketing. Section 8(b)(4)(D) and 8(b)(7)(C) govern only the object of union picketing, not its location. The situs of picketing, like any other union conduct on private property, is, as this Court made clear in *Hudgens*, controlled only by the accommodation doctrine of *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956).[6] Thus, even if the Board were to find, pursuant to a § 8(b) charge filed by Sears, that the object of the Union's picketing was unlawful, the resulting cease and desist order would only ban the Union from picketing for a jurisdictional or recognitional objective; it would not terminate picketing on Sears' property. If the Union then desired to remain on Sears' property, it could simply change the object of its picketing to a legitimate one. Indeed, if the Board's "arguably" prohibited analysis was correct, a union, as an

6. The only way that this issue of location can be resolved by the Board is in the context of an unfair labor practice proceeding against an employer who is seeking to remove such union activity from its private property. At that point, the question of whether the location is *protected* can be brought before the Board. See Pet. Br., pp. 14-18.

NLRA law-breaker asserting the doctrine of preemption, would be in a position superior to the situation in which it would be if it had obeyed the Act.

4. The Union's assertion (Union Br., pp. 7-18) that resolution of the preemption issue "in the present context would be premature" is incorrect. Initially, the California court correctly addressed the basic jurisdictional issue before evaluating the state law issues. The Union would have the state courts evaluate the merits of a case before determining whether its jurisdiction permits it to conduct such an evaluation. Moreover, the failure of the Union to raise in timely fashion the "undiscovered" California statute (Cal. Code Civ. Procedure, § 527.3), upon which it relies, renders it inappropriate to now present these issues to this Court. *Amalgamated Food Emps., et al.* v. *Logan Valley Plaza, et al.*, 391 U. S. 308, 337 (Harlan, J., dissenting).

In any event, the Union is incorrect in asserting that no action lies under California law to preclude the instant trespass. The two California courts below that addressed the issue reached the opposite result and nowhere does the decision of the California Supreme Court suggest that this view is incorrect. Nor does the "undiscovered" section 527.3 of the California Code of Civil Procedure, relied on by the Union, affect that conclusion. This section does not alter the substantive law of criminal trespass, expressly disclaiming any such intention:

> "(e) It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity."

Subsection (b)(1), the provision relied on by the Union,[7] only protects picketing in situations where the pickets, unlike this case, may "lawfully be" situated. In short, this provision does not define the lawful location at which picketing may occur but only, as the California courts have stated in an analogous context, *"preserve[s] the existing law"* as to its situs. *City and*

County of San Francisco v. *Evankovich*, 137 Cal. Rpts. 883, 890 (Ct. of App. 1977) (emphasis added). Hence, the determination of the lower California courts that the pickets were, in fact, not where they "may lawfully be" remains undisturbed by the "undiscovered" statute. Pet. App. D., pp. 15-30; accord: *International Molders and Allied Workers Union, Local 164, AFL-CIO* v. *Superior Court*, 138 Cal. Rptr. 794 at 797-798 (Ct. of App. 1977), pet. for hearing den, Cal. S. Ct., 1977.

III. CONCLUSION

For the reasons stated in its principal brief and in this brief, Sears, Roebuck and Co. respectfully prays that judgment of the Supreme Court of California be reversed and that this case be remanded to that Court with instructions to assert jurisdiction.

Respectfully submitted,

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7. "(b) The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

(1) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or *any place where any person or persons may lawfully be*, or by any other method not involving fraud, violence or breach of the peace" (emphasis added).